Segi Astana Sdn Bhd & Anor v Malaysia Airports Holdings Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24NCC(ARB)-25–05 OF 2021 AND WA-24NCC(ARB)-26–05 OF 2021
LIZA CHAN JC
10 OCTOBER 2021

Arbitration — Award — Enforcement — Arbitrator issued final award in relation to payment of fixed monthly charges — Arbitrator made correction to final award and issued corrective award — Defendant applied to enforce award — Whether defendant complied with s 38 of the Arbitration Act 2005

Arbitration — Award — Setting aside — Arbitrator issued final award in relation to payment of fixed monthly charges — Arbitrator made correction to final award and issued corrective award — Plaintiffs applied to set aside award — Whether arbitrator acted in excess of jurisdiction and exceeded scope of authority — Whether corrective award was made outside permitted scope of article 38 of part II of AIAC Arbitration Rules and s 35(1) of Arbitration Act 2005 and ought to be set aside — Whether award was in conflict with public policy of Malaysia by reason of breach of natural justice — Arbitration Act 2005 ss 8, 18(3), (5), (7), 35, 37 & 38 — AIAC Arbitration Rules article 38 of Part II

Vide a concession agreement ('SASB CA') between Segi Astana Sdn Bhd ('the first plaintiff"), WCT Bhd ('the second plaintiff') and Malaysia Airports Holdings Bhd ('the defendant'), the first plaintiff was appointed by the defendant to design, construct and complete the KLIA-2 Integrated Complex ('KLIA-2 IC') and to manage, operate and maintain the KLIA-2 IC and demand, collect and retain the revenue derived from the KLIA-2 IC. Pursuant thereto, the defendant and Airport Cooling Energy Supply Sdn Bhd ('ACES') entered into a concession agreement for the privatisation of the development of a generation plant, which included a district cooling plant, at KLIA-2. The duration of the concession was for 20 years. The dispute between the parties arose out of the first plaintiff's obligation to pay fixed monthly charges ('FMC') pursuant to cl 8.1(d) of the SASB CA whereby the defendant claimed that the first plaintiff was liable to pay RM958,849.33 from the total amount of RMRM3,595,685 per month. Pursuant to cl 14.1 of the SASB CA, the matter was referred to the arbitration for a claim by the defendant against the first plaintiff for the total sum of RM73,832,398.41 being the FMC sum from May 2014 to September 2020. The arbitrator had issued the final award on 31 March 2021 ('the initial award') but upon application by the defendant

seeking interpretation and/or correction to para 308.1 of the initial award, the arbitrator had issued the correction to the final award on 23 April 2021 ('the corrective award'). Aggrieved by the decision, the plaintiffs had filed originating summons ('OS 25') against the defendant to set aside both the initial award and the corrective award ('the award') pursuant to s 37 of the Arbitration Act 2005 ('the AA'). The defendant on the other hand filed originating summons ('OS 26') to recognise and enforce the award. The issues raised in the present case were: (a) whether the arbitrator had acted in excess of his jurisdiction and whether he exceeded his scope of authority when he made an order for payment of FMC to be paid by the first plaintiff to ACES; (b) whether the corrective award was made outside the permitted scope of article 38 of Part II of the AIAC Arbitration Rules and s 35(1) of the AA, and ought to be set aside; and (c) whether the award was in conflict with the public policy of Malaysia by reason of breach of natural justice when the arbitrator departed from the pleaded case and made an order for specific performance which was not prayed for.

Held, dismissing OS 25 with costs and allowing OS 26 with costs:

(1) Any challenge to jurisdiction ought to be made not later than the filing of the defence. If a question was raised on the jurisdiction of the arbitrator, either by a party or by the arbitrator himself, and if objection was pressed, under s 18(7) of the AA, the arbitral tribunal may rule on a plea referred to in sub-s (3) or (5) of s 18, either as a preliminary question or in an award on the merits or the arbitrator should see whether the parties will themselves take steps to obtain a final ruling on the question of jurisdiction by seeking declaratory relief in court. Which course the arbitrator should adopt would depend on the circumstances. In this case, the plaintiffs invoked neither provision in s 18(3) and (5). *Cadit quaestio* (see paras 35–37).

(2) The plaintiffs' challenge under s 37(1)(a)(iv) and (v) of the AA was in effect a challenge on the merits of the claim which was not open to the court to delve into. It was not the court's task to consider whether the arbitrator was right or wrong in ordering payment to be made to ACES. Errors of law or lack of appreciation of facts were not considerations for setting aside an arbitral award or grounds to refuse recognition of an award. In addition, s 8 of the AA obviously circumscribed intervention by the court in matters related to arbitration. The plaintiffs were not entitled to relitigate the matter (see paras 44–45 & 47).

(3) In this case, there was no dispute that the correction was made within 30 days. Therefore, the court was of the view that the correction was within the meaning of article 38 of Part II of the AIAC Arbitration Rules and s 35(1) of the AA (see para 52).

(4) There was no breach of public policy or natural justice during the arbitral proceedings or in connection with the making of the award. There was nothing illegal in the award that contravened public policy, nor did the plaintiffs produce any evidence demonstrating that they were denied the opportunity to be heard in any way by the arbitrator, or anything wrong with the award. The court accepted the defendant's argument that the plaintiffs were actually disputing the merits of the award and not attacking the decision-making process. The court was therefore not satisfied that the plaintiffs had been denied natural justice by the arbitrator, and found that the plaintiffs' contentions were in substance, an appeal but cloaked as a denial of natural justice (see paras 59–61).

(5) The matters dealt with in the award were matters well within the domain of the arbitrator and they were not grounds to be raised in an application to set aside the award. Even if, assuming the plaintiffs' complaint on breach of public policy or natural justice was made out, the court nevertheless, had a discretion not to set aside an award under s 37(1) of the AA. This was clear from the use of the permissive word 'may' in s 37(1) of the AA (see para 65).

(6) In OS 26, the defendant sought to register and enforce the award against the first plaintiff. The court found that the defendant had complied with the provisions of s 38 of the AA and the wording of s 38(1) of the AA was cast in mandatory language by the use of the word 'shall'. In addition, it was agreed by the parties at the inception of the hearing that the fate of OS 25 would determine the fate of OS 26. As the court had dismissed OS 25 with costs, it followed that OS 26 ought to be allowed with costs (see paras 2 & 67–70).

[Bahasa Malaysia summary

Melalui perjanjian konsesi ('SASB CA') antara Segi Astana Sdn Bhd ('plaintif pertama'), WCT Bhd ('plaintif kedua') dan Malaysia Airports Holdings Bhd ('defendan'), plaintif pertama dilantik oleh defendan untuk mereka bentuk, membina dan menyiapkan Kompleks Bersepadu KLIA-2 ('KLIA-2 IC') dan mengurus, mengendali dan menyelenggara KLIA-2 IC serta menuntut, mengumpul dan mengekalkan hasil yang diperoleh daripada KLIA-2 IC. Selaras dengan itu, defendan dan Airport Cooling Energy Supply Sdn Bhd ('ACES') memeterai perjanjian konsesi untuk penswastaan pembangunan loji penjanaan, termasuk loji penyejukan daerah, di KLIA-2. Tempoh konsesi adalah selama 20 tahun. Pertikaian antara pihak-pihak timbul daripada kewajipan plaintif pertama untuk membayar caj bulanan tetap ('FMC') menurut klausa 8.1(d) SASB CA di mana defendan mendakwa bahawa plaintif pertama bertanggungjawab membayar RM958,849.33 daripada jumlah keseluruhan RMRM3,595,685 sebulan. Menurut klausa 14.1 SASB CA, perkara tersebut telah dirujuk kepada timbang tara untuk tuntutan oleh defendan terhadap plaintif pertama bagi jumlah keseluruhan

RM73,832,398.41 iaitu jumlah FMC dari Mei 2014 hingga September 2020. Penimbangtara telah mengeluarkan award akhir pada 31 Mac 2021 ('award pertama') tetapi setelah permohonan oleh defendan untuk mendapatkan tafsiran dan/atau pembetulan kepada perenggan 308.1 award pertama tersebut, penimbang tara telah mengeluarkan pembetulan kepada award akhir pada 23 April 2021 ('award pembetulan'). Terkilan dengan keputusan tersebut, plaintif-plaintif telah memfailkan saman pemula ('SP 25') terhadap defendan untuk mengenepikan kedua-dua award pertama dan award pembetulan ('award tersebut') menurut s 37 Akta Timbang Tara 2005 ('AT'). Defendan sebaliknya memfailkan saman pemula ('SP 26') untuk mengiktiraf dan menguatkuasakan award tersebut. Isu yang dibangkitkan dalam kes ini ialah: (a) sama ada penimbang tara telah bertindak melebihi bidang kuasanya dan sama ada dia telah bertindak melebihi skop kuasanya apabila dia membuat perintah untuk pembayaran FMC dibayar oleh plaintif pertama kepada ACES; (b) sama ada award pembetulan dibuat di luar skop artikel 38 Bahagian II Peraturan Timbang Tara AIAC dan s 35(1) AT, dan patut diketepikan; dan (c) sama ada award tersebut bercanggah dengan dasar awam Malaysia kerana melanggar keadilan semula jadi apabila penimbang tara tersasar dari kes yang diplidkan dan membuat perintah untuk pelaksanaan spesifik yang tidak dimohon.

Diputuskan, menolak SP 25 dengan kos dan membenarkan SP 26 dengan kos:

(1) Apa-apa cabaran terhadap bidang kuasa hendaklah dibuat tidak lewat daripada pemfailan pembelaan. Jika persoalan dibangkitkan mengenai bidang kuasa penimbang tara, sama ada oleh satu pihak atau penimbang tara itu sendiri, dan jika bantahan dibuat, di bawah s 18(7) AT, tribunal timbang tara boleh membuat keputusan atas permohonan yang disebut dalam sub-s (3) atau (5) daripada s 18, sama ada sebagai persoalan awalan atau di dalam award atas merit atau penimbang tara harus melihat sama ada pihak-pihak itu sendiri akan mengambil langkah untuk mendapatkan keputusan muktamad mengenai persoalan bidang kuasa dengan memohon relif pengisytiharan di mahkamah. Cara mana yang harus diguna pakai oleh penimbang tara bergantung pada keadaan. Dalam kes ini, plaintif-plaintif tidak mengguna pakai mana-mana peruntukan dalam s 18(3) dan (5). *Cadit quaestio* (lihat perenggan 35–37).

(2) Cabaran oleh plaintif-plaintiff di bawah s 37(1)(a)(iv) dan (v) AT adalah sebenarnya cabaran ke atas merit tuntutan yang mahkamah tidak boleh campur tangan. Bukan tugas mahkamah untuk mempertimbangkan sama ada penimbang tara betul atau salah dalam mengarahkan pembayaran dibuat kepada ACES. Kesilapan undang-undang atau kekurangan penghayatan fakta bukanlah pertimbangan untuk mengenepikan award timbang tara atau alasan untuk menolak

pengiktirafan award. Di samping itu, s 8 AT jelas mengehadkan campur tangan oleh mahkamah dalam perkara yang berkaitan dengan timbang tara. Plaintif-plaintif tidak berhak untuk membicarakan semula perkara tersebut (lihat perenggan 44–45 & 47).

(3) Dalam kes ini, tiada pertikaian bahawa pembetulan tersebut dibuat dalam tempoh 30 hari. Oleh itu, mahkamah berpendapat bahawa pembetulan tersebut adalah selaras dengan maksud artikel 38 Bahagian II Peraturan Timbang Tara AIAC dan s 35(1) AT (lihat perenggan 52).

(4) Tiada pelanggaran dasar awam atau keadilan semula jadi semasa prosiding timbang tara atau berkaitan dengan pemberian award. Tiada apa-apa yang menyalahi undang-undang dalam award yang melanggar dasar awam, dan plaintif-plaintif tidak mengemukakan apa-apa keterangan yang menunjukkan bahawa mereka dinafikan peluang untuk didengar dalam apa cara sekalipun oleh penimbang tara, atau apa-apa yang salah dengan award. Mahkamah menerima hujah defendan bahawa plaintif-plaintif sebenarnya mempertikaikan merit award dan bukannya mencabar proses membuat keputusan. Oleh itu, mahkamah tidak berpuas hati bahawa plaintif-plaintif telah dinafikan keadilan semula jadi oleh penimbang tara, dan mendapati bahawa pertikaian oleh plaintif-plaintif adalah pada hakikatnya merupakan satu rayuan tetapi berselindung sebagai penafian keadilan semula jadi (lihat perenggan 59–61).

(5) Perkara yang dibicarakan dalam award tersebut adalah perkara yang berada dalam bidang kuasa penimbang tara dan ia bukan alasan untuk dibangkitkan dalam permohonan untuk mengenepikan award tersebut. Andai kata aduan plaintif-plaintif mengenai pelanggaran dasar awam atau keadilan semula jadi telah dibuktikan, mahkamah bagaimanapun, mempunyai budi bicara untuk tidak mengenepikan award di bawah s 37(1) AT. Ini jelas daripada penggunaan perkataan permisif 'may' dalam s 37(1) AT (lihat perenggan 65).

(6) Dalam SP 26, defendan memohon untuk mendaftar dan menguatkuasakan award tersebut terhadap plaintif pertama. Mahkamah mendapati defendan telah mematuhi peruntukan s 38 AT dan perkataan yang digunakan dalam s 38(1) AT bersifat mandatori dengan penggunaan perkataan 'shall'. Di samping itu, ia telah dipersetujui oleh pihak-pihak pada permulaan perbicaraan bahawa keputusan SP 25 akan menentukan keputusan SP 26. Memandangkan mahkamah telah menolak SP 25 dengan kos, oleh yang demikian, SP 26 sepatutnya dibenarkan dengan kos (lihat perenggan 2 & 67–70).]

Cases referred to

Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal [2018] 4 MLJ 799, CA (refd)

Beaufort International Hotels Ltd v Tanjong Aru Hotel Sdn Bhd [1988] 1 CLJ Rep 378, HC (refd)
Beswick v Beswick [1967] 2 All ER 1197, HL (refd)
Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1, FC (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)
Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd [2019] MLJU 1755; [2019] 6 CLJ 588, CA (refd)
Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401; [2004] 1 CLJ 743, FC (refd)
Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413, FC (folld)
Jupiter Securities Sdn Bhd v Datin Wo Tang Koi @ Wu Shya Kwee & Ors and another case [2015] MLJU 2329, HC (refd)
Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126, CA (refd)
Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd [2000] 3 MLJ 310, CA (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156, FC (refd)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198; [2020] 9 CLJ 213, FC (refd)
NZ New Image Sdn Bhd v Loh Yok Liang [2016] MLJU 1768; [2016] 9 CLJ 474, CA (refd)
Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113; [2007] 3 CLJ 185, CA (refd)
Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd [2018] 3 MLJ 608, CA (refd)
Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42, CA (refd)
Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR 86, CA (folld)
Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] MLJU 1196; [2017] 9 CLJ 273, FC (refd)
The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441; [2011] 6 AMR 573; [2012] 3 CLJ 423, FC (refd)
Wong Wai Hong v Mohamed Ariff s/o Kader Mohiadeen [2018] MLJU 1293, HC (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005)
Arbitration Act 2005 ss 8, 18(3), (5), (7), (8), (9), 35(1), (2), 37, 37(1), (1)(a)(iv) , (1)(a)(v), (1)(b)(ii), 38, 38(1), 39, 42

Shanti Mogan (Lilien Wong and Yiew De Quan with her) (Shearn Delamore & Co) in Originating Summons No WA-24NCC(ARB)-25–05 of 2021 for the plaintiff.
Choon Hon Leng (Sean Ng and Zack Tan Zhang with him) (Raja, Darryl & Loh)

in Originating Summons No WA-24NCC(ARB)-25–05 of 2021 for the defendant.

Choon Hon Leng (Sean Ng and Zack Tan Zhang with him) (Raja, Darryl & Loh) in Originating Summons No WA-24NCC(ARB)-26–05 of 2021 for the plaintiff.

Shanti Mogan (Lilien Wong and Yiew De Quan with her) (Shearn Delamore & Co) in Originating Summons No WA-24NCC(ARB)-26–05 of 2021 for the defendant.

Liza Chan JC:

INTRODUCTION

[1] Originating Summons WA-24NCC(ARB)-25–05 of 2021 ('OS 25') was filed by the plaintiffs ('SASB' and 'WCT') against the defendant ('MAHB') to set aside a final award dated 31 March 2021 ('the initial award') and the correction to final award dated 31 March 2021 dated 23 April 2021 ('the award') pursuant to s 37 of the Arbitration Act 2005 ('the AA 2005'). MAHB as plaintiff in OS No WA-24NCC(ARB)-26–05 of 2021 ('OS 26') applied to recognise and enforce the award.

[2] Both OS 25 and OS 26 were heard together, and it was agreed by the parties at the inception of the hearing that the fate of OS 25 will determine the fate of OS 26.

[3] I acceded, as I am of the view that the award is either recognised and not set aside, or not recognised and is to be set aside.

[4] The affidavits filed in respect of OS 25 are:

(a) plaintiffs' affidavit in support affirmed by Khor Loke Yew on 4 May 2021;

(b) defendant's affidavit in reply affirmed by Nor Aida bt Othman on 19 May 2021;

(c) plaintiffs' affidavit in reply by Khor Loke Yew filed on 18 June 2021; and

(d) defendant's supplementary affidavit affirmed by Nor Aida bt Othman on 2 July 2021.

[5] The affidavits filed in respect of OS 26 are:

(a) MAHB's affidavit in support affirmed by Nor Aida bt Othman on 4 May 2021;

(b) SASB's affidavit in reply by Khor Loke Yew filed on 21 June 2021; and

(c) MAHB's affidavit in reply affirmed by Nor Aida bt Othman on 2 July 2021.

[6] After having read the cause papers, considered the submissions and heard oral arguments, I dismissed OS 25 and allowed OS 26. This judgment contains the reasons for the decisions delivered on 1 September 2021.

BACKGROUND FACTS

[7] SASB, WCT and MAHB entered into a concession agreement dated 22 September 2011 ('SASB CA') whereby SASB was appointed to, inter alia, design, construct and complete the KLIA-2 Integrated Complex ('KLIA-2 IC') and to manage, operate and maintain the KLIA-2 IC and demand, collect and retain the revenue derived from the KLIA-2 IC. MAHB is the owner of Kuala Lumpur International Airport 2 ('KLIA-2') and the project to construct KLIA-2. KLIA-2 IC is part of KLIA-2.

[8] Concomitant with the SASB CA, MAHB and Airport Cooling Energy Supply Sdn Bhd ('ACES') entered into a concession agreement dated 27 October 2011 ('ACES CA') for the privatisation of the development of a generation plant, which includes a district cooling plant ('DCP'), at KLIA-2. The duration of the concession is for 20 years. ACES is jointly owned by MAHB and TNB Engineering Corp Sdn Bhd ('TNEC') on a share proportion of 23:77.

[9] KLIA-2 came into operation on 2 May 2014.

[10] The dispute between MAHB, SASB and WCT arose out of SASB's obligation to pay fixed monthly charges ('FMC') pursuant to cl 8.1(d) of the SASB CA ('chilled water clause'), which reads:

> The Concession Company shall procure chilled water for the cooling system of the KLIA-2 Integrated Complex from MAHB's privatised concessionaire at a price per unit comparable to the rates payable by MAHB.

[11] ACES is the 'privatised concessionaire' referred to in the chilled water clause from whom SASB should procure chilled water.

[12] ACES built a District Cooling Plant DCP to supply chilled water for both the KLIA-2 Main Terminal Building MTB (operated by MAHB) and KLIA-2 IC (operated by SASB). SASB has been procuring chilled water from ACES since the KLIA-2 IC started operation.

[13] There are two price components for procurement of chilled water. One

A is the Cooling Energy Charge ('CEC') which is a charge based on units consumed by the user and the other is the FMC calculated based on the development and construction cost of the DCP. SASB has been paying the CEC to ACES for chilled water supplied to the KLIA2 IC from the DCP.

B **[14]** MAHB pays a fixed monthly charge ('FMC') of RM3,595,685 for 20 years to ACES in view of ACES investment in the development and construction of the DCP (cl 4.6.10 and Schedule D of the ACES CA).

C **[15]** From the FMC of RM3,595,685, the dispute lies in MAHB 's claim that SASB is liable to pay RM958,849.33 (calculated based on the 4,800RT capacity allocated to the KLIA-2 IC) per month as FMC from 2 May 2014 until 1 May 2034 for a period of 20 years (the duration of the ACES CA) pursuant to the chilled water clause. WCT is the parent company of SASB and D was sued as a party to the SASB CA for its obligation to indemnify MAHB for SASB's breaches.

[16] Pursuant to cl 14.1 of the SASB CA, the disputes between the parties were referred to a sole arbitrator jointly agreed by the parties, Mr Nahendran E Navaratnam, a senior practising lawyer. MAHB was the claimant in the arbitration, with SASB and WCT defending. The arbitration hearing took place over five days from between 10 August 2020 and 21 September 2020. On 31 March 2021, the arbitrator issued the final award.

F **[17]** On 8 April 2021, MAHB, through its solicitors, made a demand for, inter alia, the sum of RM73,832,398.41 being the FMC sum from May 2014 to September 2020 and stated that ACES had consented to the said payment being made to MAHB. SASB and WCT thereafter, through their solicitors, G responded on 15 April 2021 to deny and dispute the contents of MAHB solicitors' letter dated 8 April 2021.

[18] On 18 April 2021, MAHB, wrote to the arbitrator, through its solicitors, to seek the interpretation and/or correction of para 308.1 of the H initial award.

[19] On 19 April 2021, SASB and WCT responded through their solicitors, stating that the MAHB's request does not fall within the ambit of article 37 and article 38 of Part II of AIAC Arbitration Rules and that the arbitrator was I functus officio.

[20] On 23 April 2021, the arbitrator issued the correction to final award dated 31 March 2021 ('corrective award') (see plaintiffs' 25 AIS, exh 'P2') to amend para 308.1 of the initial award to be read as follows:

I declare that the proportionate Fixed Monthly Charge is payable by the 1st Respondent to Airport Cooling Energy Supply Sdn Bhd (ACES) in the sum of RM958,849.33 on a monthly basis from 02.05.2014 until and inclusive of September 2020.

[21] As a result, the award is as follows:

(a) the arbitrator declared that the FMC payable by SASB to ACES is RM958,849.33 on a monthly basis (from 2 May 2014 until and inclusive of September 2020);

(b) SASB is required to pay RM73,832,398.41 from 2 May 2014 until and inclusive of September 2020 (the date this sum was computed in post-hearing written submissions in the Arbitration); and

(c) costs and interest were awarded against SASB (para 308, award and para 11, correction to final award).

[22] SASB and WCT being dissatisfied with the initial award and corrective award, on 4 May 2021 filed OS 25 to set aside the award. MAHB, on the other hand, on 5 May 2021 filed OS 26 to recognise and enforce the award.

SASB AND WCT'S CASE FOR SETTING-ASIDE THE AWARD (OS 25)

[23] SASB and WCT's contentions for setting aside the award in gist are:

(a) the arbitrator has acted in excess of his jurisdiction when he made an order for payment of FMC to be paid by SASB to ACES when such relief was not part of the reliefs sought by MAHB, and ACES was not a party to the arbitration;

(b) the award therefore:

(i) dealt with a dispute not contemplated by nor falling within the terms of submission to the arbitration; and/or

(ii) contained decision on matters beyond the scope of the submission to the arbitration, and ought to be set aside under s 37(1)(a)(iv) and (v) of the AA 2005;

(c) the corrective award was made outside the permitted scope of article 38 of Part II of the Arbitration Rules and s 35(1) of the AA 2005, and ought to be set aside; and

(d) there was a serious and material breach of natural justice that had materially affected the outcome of the arbitration and the award is liable to be set aside under s 37(1)(b)(ii) of the AA 2005.

[24] SASB posited that given that the award should be set aside, MAHB's

application to enforce and recognise the award in OS 26 should be dismissed.

[25] MAHB disagreed and argued that the grounds advanced by the plaintiffs to set aside the award are without basis; they also do not fall within any of the grounds set out in s 37 (grounds to set aside an award) or s 39 of the 2005 AA (grounds to refuse registration of an award).

ISSUES

[26] In my view, the issues for determination in OS 25 are as follows:

(a) whether the arbitrator has acted in excess of his jurisdiction and whether he exceeded his scope of authority when he made an order for payment of FMC to be paid by SASB to ACES;

(b) whether the corrective award was made outside the permitted scope of article 38 of Part II of the Arbitration Rules and s 35(1) of the AA 2005, and ought to be set aside; and

(c) whether the award is in conflict with the public policy of Malaysia by reason of breach of natural justice.

Whether the arbitrator has acted in excess of his jurisdiction and whether he exceeded his scope of authority

[27] For ease of reference, s 37 of the AA 2005:

37 Application for setting aside

(1) An award may be set aside by the High Court only if —

(a) the party making the application provides proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which

the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred-

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application.

[28] On the first ground of challenge, SASB and WCT's learned counsel Mr Choon Hon Leng postulated that as MAHB's claim in the arbitration is a monetary claim for a sum of money to be paid to MAHB and nothing else, that being the case, the order made by the arbitrator at para 308.3 of the award which is for an order for specific performance is an order that deals with a dispute not contemplated by or falling within the terms of submission to the Arbitration, and such order is a decision on matters beyond the scope of the submission to the Arbitration. The award ought to be set aside under s 37(1)(a)(iv) and/or (v) of the AA 2005.

[29] In this regard, Mr Choon drew attention that para 78(b) of the points of claim read:

> (b) an order for the 1st Respondent to make payment to the Claimant and/or ACES for and on behalf of the Claimant for the FMC of RM958,849.33 on a monthly basis for 20 years (from 2.5.2014 until 1.5.2034 or for such periods as determined by this arbitral tribunal).

[30] Mr Choon, inter alia, argued that:

(a) even though MAHB has sought a relief for money to be paid to ACES, it was for and on behalf of MAHB. To fall within the pleaded case, it would still be MAHB who has the entitlement to be paid by SASB;

(b) in the points of claim, MAHB did not pray for any relief for FMC to be paid to ACES in ACES's own capacity (ie not for and on behalf of MAHB) or a prayer that is anchored upon ACES' independent or enforceable right to be paid;

(c) MAHB's pleaded position that the relief sought by MAHB is for money to be paid by SASB to MAHB (whether to MAHB directly or through ACES for and on its behalf), and not to ACES for itself, is consistent with MAHB's position before, during and after the arbitration:

(i) prior to the commencement of the arbitration, MAHB demanded for payment to be made to MAHB (and not ACES). SASB and WCT had not received any demand for payment of FMC from ACES;

(ii) it was the refusal to pay MAHB, that triggered the arbitration. The dispute was whether SASB was obliged to pay MAHB, that was referred to arbitration;

(iii) at the arbitration, MAHB has specifically prayed for payment to be made to MAHB and did not seek any relief that was premised upon ACES' independent entitlement to be paid;

(iv) no amendment to the prayers was sought or made by MAHB throughout the proceedings;

(v) in the claimant's opening submissions dated 3 August 2020, MAHB had reaffirmed its position that what MAHB is asking for is for the money to be paid to MAHB (and not ACES) at para 30;

(vi) although MAHB now seeks to rely on paras 28 and 29 of the claimant's opening submissions, those paragraphs bear no relevance. Paragraphs 28 and 29 merely provide an illustration on how the payment would have flowed if the Cooling Energy Supply Agreement ('CESA') was entered into. The fact is that the CESA was never entered into and MAHB's claim for specific performance

to compel SASB to enter into the CESA (para 78(c) of the points of claim) was dismissed by the arbitrator;

(vii) at the oral evidential hearing, MAHB's witness has taken the same stance and reiterated that MAHB's claim is for money that SASB was supposed to pay MAHB. The witness statement of Ms Wong Meng Fang, said this:

> 2. The Claimant has a claim against the Respondents in respect of fixed month charges ('FMC') due from the 1st Respondent to the Claimant pursuant to Clause 8.1(d) of the Concession Agreement between the Claimant and the Respondents ('SASB CA') ...

(viii) even after the award has been issued, the demand made by MAHB is still for the money to be paid to MAHB (and not ACES).

(d) MAHB then departed from its pleaded case by contending that money should be paid to ACES (without qualification) as its main relief at the final submission stage. A new claim was introduced by introducing a new party to have an independent right to receive payment and the original claim had been relegated to be an alternative claim;

(e) from the pleaded relief at para 78(b) of the points of claim, MAHB is only asking for money to be paid in either one or both of the following specific modes:

(i) FMC to be paid to MAHB; and/or

(ii) FMC to be paid to ACES for and on behalf of MAHB.

(f) the arbitrator having expressly found at para 244 of the award that payment cannot be ordered to be made 'for and on behalf of MAHB' therefore could not grant the reliefs as expressly prayed for by MAHB under para 78(b) of the points of claim, ought to have dismissed the claim; instead, the arbitrator then went further to determine whether 'the relief claimed by MAHB can reasonably be characterized as a claim for specific performance of the payment of money to a third party'. And in so doing, the arbitrator erred and exceeded his jurisdiction;

(g) in this regard, Mr Choon relied on the case of *NZ New Image Sdn Bhd v Loh Yok Liang* [2016] MLJU 1768; [2016] 9 CLJ 474, where the Court of Appeal has rejected the attempt for a specific performance plea to also double up as a damages claim in the alternative:

> [33] Accordingly, where a person wishes to claim for damages, he would have to do so by way of an alternative claim for damages. Or he can otherwise sue for specific performance only. In the present appeal, the essence of the appellant's claim in the circumstances of the case was for specific performance only. They did not seek the alternative remedy of 'damages in lieu of specific performance'.

> [34] The High Court, in *Insofex Sdn Bhd v Labasama Group (M) Sdn Bhd (No 2)*, touching on s 18 of the Specific Relief Act 1950 and O 81 of the Rules of the High Court 1980 explained that: In practice, a plaintiff who seeks an order for specific performance will ask for damages in addition to, or in substitution for specific performance. For instance, a plaintiff will claim for specific performance of the agreement and 'further or alternatively' will claim for damages for breach of contract or in the words of *Horsler v Zorro* [1975] Ch 302, the plaintiff will seek 'damages in lieu of or in addition to specific performance'.

(h) reliance was also made on the Court of Appeal case of *Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd* [2000] 3 MLJ 310, where it was held that the respondent cannot be allowed to change the whole nature of their claim which essentially is a claim for specific performance, by turning it into an ordinary action for damages;

(i) if MAHB intended to plead for specific performance, then MAHB ought to have specifically pleaded it — *Beaufort International Hotels Ltd v Tanjong Aru Hotel Sdn Bhd* [1988] 1 CLJ Rep 378 and *Wong Wai Hong v Mohamed Ariff s/o Kader Mohiadeen* [2018] MLJU 1293;

(j) the 'catch-all' plea under para 81(c) of the points of claim does not avail MAHB as specific performance must be specifically pleaded and a monetary claim cannot double up as a specific performance plea — *NZ New Image Sdn Bhd v Loh Yok Liang* and *Jupiter Securities Sdn Bhd v Datin Wo Tang Koi @ Wu Shya Kwee & Ors and another case* [2015] MLJU 2329;

(k) the arbitrator exceeded his jurisdiction beyond the scope of submission to him by the parties. In this respect, the arbitrator allegedly made an order for specific performance which was not pleaded. Reliance was made to the Court of Appeal decision of *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2018] 3 MLJ 608 which was affirmed by the Federal Court, where Mary Lim JCA (as Her Ladyship then was) in delivering the Court of Appeal's decision held that:

> [83] We agree with the submissions of learned counsel for the appellant that points of claim, responses/defences and replies are to parties in an arbitration as pleadings are to the litigants in a court of law. *Unless the parties have agreed to the contrary, those 'pleadings' define the disputes between the parties and the extent of jurisdiction and submission to the jurisdiction of the arbitrator* — see s 25 of Act 646. Section 25 is modeled after article 23 of the model law withamendments adopted in 2006. The Travaux Preparatoires of UNCITRAL Model Law and the Analytical Commentary on Draft Text of a Model Law on [2018] 3 MLJ 608 at 641 International Commercial Arbitration (Report of the Secretary General, UN Commission on International Trade Law, 18th Session, A/CN.9/264), commenting on article 23 states at pp 51–52:

> 1. Paragraph (1) deals with the preparation of the case in writing. The first sentence sets forth those elements of the initial pleadings which are essential for defining the dispute on which the Arbitral Tribunal is to give a decision. it is then up to the Arbitral Tribunal to require further statements or explanations, under its general power of article 19(2). The required contents of the initial statement of claim and of the respondent's reply may be regarded as so basic and necessary as to conform with all established arbitration systems and rules. It is in this spirit that the provision does not go into particulars such as to whom the statements must be addressed.
>
> ...
>
> [85] Not only do these pleadings define the dispute(s) that are referred to arbitration, more importantly, *the arbitrator takes his mandate and authority from those pleadings insofar as what is required for his determination. The arbitrator cannot exceed those terms of reference or limits of submission which have been demarcated by consensual agreement between the parties.* Otherwise, these breaches may become the basis of setting aside of awards under other provisions of s 37(1)(a) of Act 646.
>
> [86] The arbitrator does not set those limits of jurisdiction, the arbitrator's jurisdiction is defined for him by the parties. In this case, not only do the pleadings precisely demarcate and define the dispute, the terms were also agreed to at a preliminary meeting on 11 February 2014 between the arbitrator and the parties'. (Plaintiffs' emphasis.)

(l) the learned arbitrator made orders which actually do not affect MAHB, but affecting a non-party, ACES, a stranger and not a party privy to the present arbitration. The arbitrator had wrongly assumed jurisdiction on disputes and over parties which he did not have.

[31] In opposition, Ms Shanti Mogan, learned counsel for MASB contended that:

(a) the threshold to set aside an arbitral award is high. Section 8 of the AA 2005 provides that 'No court shall intervene in matters governed by this Act, except where so provided in this Act'. The Federal Court in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 stated:

> [57] The court must evaluate the nature and impact of the particular breach in deciding whether the award should be set aside under s 37. The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model Law. The effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international

practice (see: *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & another appeal* [2011] MLJU 1537; [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43). In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined. (Counsel's emphasis.)

(b) the arbitrator's order for payment to be made by SASB to ACES does not fall outside the scope of arbitration as there was only one clause in issue (cl 8.1(d) of the SASB CA) and it required a determination of whether it was enforceable, and if so, how much should be paid by SASB, and to whom;

(c) the arbitrator did not decide on a matter that he created or added to the arbitration — *Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd* [2019] MLJU 1755; [2019] 6 CLJ 588 and *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126*;*

(d) the matter as to whom the sum was to be paid, was squarely put before the arbitrator and rightly considered by the arbitrator. MAHB prayed for an order for SASB to make payment to MAHB and/or Airport Cooling Energy Supply Sdn Bhd ('ACES') for and on behalf of MAHB for the FMC (para 78(b) of the points of claim);

(e) in paras 40 and 44 of the points of claim, MAHB pleaded payment of FMC to ACES:

> 40. The respondent has, pursuant to clause 8.1 (d) of the SASB CA procured chilled water from ACES since September 2013 for commissioning and testing purposes and thereafter for the commercial operation of KLIA-2. FMC is claimed for a period of 20 years from the commercial operation of KLIA-2 beginning from 02.05.2014. While the 1st Respondent has never disputed its obligation to make payment of the FMC to ACES pursuant to Clause 8.1(d), the 1st Respondent has refused to pay the FMC.
>
> 44. The FMC is paid by the Claimant to ACES over the period of 20 years (the duration of the ACES CA). The Claimant states that the 1st Respondent's obligation pursuant to clause 8.1 (d) o f the SASB CA requires that the payment of FMC by the 1st Respondent to ACES to be made over a 20-year duration.

(f) whether FMC is payable to ACES and the amount of FMC payable to ACES was very much a live issue for the arbitrator to determine as SASB and WCT themselves had pleaded in paras 49 and 54 of the Points of Defence that SASB's obligation under cl 8.1 (d) of the SASB CA was to pay the FMC to ACES;

(g) in addition, MAHB further pleaded in the points of reply:

(i) the claimant has always maintained that the first respondent is obliged to pay RM958,849.33 as FMC to ACES (para 47 of the points of reply);

(ii) 'Malaysian law allows an order for specific performance to be made in favour of third parties' (para 55 of the points of reply); and

(iii) 'the arbitral tribunal has the jurisdiction and/or power to make and order of specific performance in favour of third parties pursuant to Malaysian law' (para 57 of the points of reply).

(h) paras 28–29 of MAHB's opening statement unequivocally sets out MAHB's position that payment ought to be made to ACES and the usage of 'for and on behalf of MAHB' for the FMC was a reflection of the arrangements between the parties as set out in the SASB CA and ACES CA:

> 28. Clause 8.1(d) of the SASB CA envisages the chilled water charges to be paid by SASB to ACES; the CEC has been paid by SASB for more than 6 years to ACES. The FMC ought likewise to have been paid by SASB to ACES. However, that was envisaged to be the case on the basis that the CESA was executed between ACES and SASB where ACES would collect the FMC on behalf of MAHB and pay the same to MAHB [see Clauses 4.6.11 and 4.11 of the ACES CA, p 236, 243, Vol 2, CBD].
>
> 29. This is enforceable as are all contracts between contracting parties for payment to a third party, in this case , MAHB's collecting agent. The fact that ACES is not a party to the arbitration proceedings does not affect MAHB's claim. It is trite law that specific performance may be ordered of a contract to make pay money to a third party. See *Silver and Another v Dome Resource NL* [2007] 62 ACSR 539 at 568.

(i) it was further stated in para 162(b) of MAHB's post hearing submissions dated 8 October 2020 that payment ought to be made to ACES;

(j) the arbitrator did not create or add new issues. The arbitrator considered the merits of the respective positions and dealt with the same in detail in paras 221–237 of the award and concluded the substance of the claim against SASB is one for specific performance of the obligation under cl 8.1(d) for payment of an agreed price of chilled water to a third party named ACES;

(k) the arbitrator did not rule on matters outside the SASB CA:

(i) the arbitrator expressly mentioned that its ruling was not based on the contractual arrangement between MAHB and ACES (para 236); and

(ii) the law provides for specific performance of an obligation to pay

money to a third party. The Tribunal was minded not to mix the order compelling to perform the obligation of MAHB under a different agreement (para 239, award).

(l) MAHB also had a 'catch all' prayer for ' such further or other relief the Claimant is entitled to under the SASB CA, or any laws, or as this arbitral tribunal may deem fit' in para 81(c) of its points of claim, citing the cases of *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 and *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; in the latter case, the Court of Appeal adopted *Lim Eng Kay v Jaafar bin Mohamed* and found that the formulation of the plaintiff's statement of claim is sufficient for the exercise of equitable jurisdiction to mould the decree of specific performance to fit the facts found by the judge in the court below;

(m) the arbitrator also made an express finding that MAHB's pleadings were sufficient for him to grant an order for payment to be made to ACES in specific performance of cl 8.1(d) of the SASB CA. SACB and WCT cannot, under the guise of a jurisdictional challenge, seek to set aside the award after losing on the merits of the claim; their complaints about the alleged lack of plea for payment to be made to ACES, is an attempt to relitigate the issues already argued before the arbitrator; s 37(1)(iv)(a) of the AA 2005 is not designed to permit a losing party to have a second bite of the cherry before this honourable court as held in *Huawei Technologies*;

(n) applications for setting aside purportedly founded on erroneous findings of law or fact do not fall within the purview of s 37(1)(a)(iv) and (v) of the AA 2005;

(o) SASB and WCT's complaint that the arbitrator did not have jurisdiction to order payment to be made by SASB to ACES which is not a party to the SASB CA or the arbitration is plainly wrong as there is distinction between a plea that the arbitral tribunal does not have jurisdiction with a plea that the arbitral tribunal is exceeding the scope of its authority — *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196; [2017] 9 CLJ 273; the challenge is in effect a challenge on the merits against the arbitrator that he could make an award of specific performance of cl 8.1(d) of the SASB CA where the beneficiary is a non party to the arbitration; such a challenge is not contemplated in s 37 of the AA; it is trite that the court does not usurp the position of the arbitrator in determining the merits of the dispute. It ought to be patently clear on such a scrutiny that the dispute fell outside the scope of the submission warranting the intervention of the court — *Huawei Technologies*, the correct test being:

> [45] ... Thus, the issue examined by the courts is not whether the decision reached by the arbitral tribunal is well-founded or even how the arbitral tribunal has reached its decisions, but merely whether this decision

transgresses the scope of the arbitrators' jurisdiction or mandate. In other words, the court must limit its investigations to what is strictly necessary for the interpretation of the scope of the arbitration agreement and the arbitrators' mandate.

(p) the parties had submitted extensively on the point whether the rightful recipient of the monies is ACES. Errors of law or lack of appreciation of facts is not a consideration for a setting aside application or ground to refuse recognition — *Huawei Technologies*. The arbitrator did not err in law and relied on *Beswick v Beswick* [1967] 2 All ER 1197 and various other cases and found he had jurisdiction to order SASB to pay FMC to ACES as a non party to the arbitration.

[32] To understand the parties' arguments, it is necessary to appreciate the ambit of the words in s 37(1)(a)(iv) and (v) of the AA 2005. In relation to this, the judgment of the Federal Court delivered by Jeffrey Tan FCJ in *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196; [2017] 9 CLJ 273 illustrates the legal position:

> [197] In relation to 'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration' and 'the award contains decisions on matters beyond the scope of the submission to arbitration', *William & Kawharu* at 17.5.4 thus commented on the first limb of article 34(2)(a)(iii) of the NZ Arbitration Act (the equivalent of s 37(1)(a)(iv) and (v) of AA 2005):
>
> > This ground for setting aside is directed at situations in which a tribunal has jurisdiction under a valid arbitration agreement, but has exceeded the authority by dealing in the award with matters that go beyond the terms of the arbitration agreement or the scope of the issues referred by the parties for resolution ... The tribunal also has an obligation to take particular care to keep within the confines of these matters that the parties have plainly put in issue ... If the tribunal exceeds its authority in respect of some matters only, and its decisions on those matters are severable from decisions on matters made within the submission to arbitration, the High Court may only set those parts of the award containing the decisions on matters not submitted to arbitration.

[33] The scope and application of s 37 of the AA 2005 is well settled. In the case of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413, the Federal Court held that:

> [57] The court must evaluate the nature and impact of the particular breach in deciding whether the award should be set aside under s 37. The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model Law. The *effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award*. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line

with the international practice (see: *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & another appeal* [2011] MLJU 1537; [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43). In this regard, *the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined*.

[34] Section 18(3), (5), (7), (8) and (9) of the AA 2005 provides:

> (3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.
>
> (5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
>
> (8) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.
>
> (9) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.
>
> (10) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

[35] Any challenge to jurisdiction ought to be made not later than the filing of the defence.

[36] If a question is raised on the jurisdiction of the arbitrator, either by a party or by the arbitrator himself, and if objection is pressed, under s 18(7), the arbitral tribunal may rule on a plea referred to in sub-s (3) or (5), either as a preliminary question or in an award on the merits or the arbitrator should see whether the parties will themselves take steps to obtain a final ruling on the question of jurisdiction — by seeking declaratory relief in court. Which course the arbitrator should adopt will depend on the circumstances.

[37] In this case, SASB and WCT invoked neither provision in s 18(3), (5). *Cadit quaestio!*

[38] In fact, the parties had submitted extensively on this issue before the arbitrator. I find whether FMC is payable to ACES and the amount of FMC payable to ACES was very much a live issue for the arbitrator to determine based on MAHB's points of claim, points of reply, opening submission and post hearing submissions.

[39] It is clear from the award that the arbitrator, rejected SASB and WCT's arguments and accepted MASB's arguments, and made an express finding and reached a conclusion that MAHB's pleadings are sufficient for him to grant an order for payment to be made to ACES in specific performance of cl 8.1(d) of the SASB CA. The arbitrator seemingly considered various cases including *Beswick v Beswick* and found he had jurisdiction to order SASB to pay FMC to ACES which was not a party to the arbitration. If anything, it appears to be that SASB and WCT are effectively challenging the arbitrator's error of law, on reading of the award.

[40] In my utmost respectful view, the arbitrator did not err in law. Even if he did err in law, it is not a ground for setting aside or ground to refuse recognition.

[41] The arbitrator is the sole judge of fact and law, and a wrong finding of fact or law is not sufficient ground to set aside an award, the court is not an appellate court. In *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113; [2007] 3 CLJ 185, Gopal Sri Ram JCA (as he then was) aptly said:

> A court when examining the objections taken to an award made by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by re-examining and reassessing the materials.

[42] Even under the old regime of the Arbitration Act 1952, an award will only be set aside in the prescribed circumstances, which are limited and exceptional: *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441; [2011] 6 AMR 573; [2012] 3 CLJ 423 (FC); *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743 (FC); *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 (CA), the court's position being to uphold party autonomy, even though some of the cases were pre-AA 2005.

[43] In *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal* [2018] 4 MLJ 799, the Court of Appeal stated:

> [19] ...
>
> (d) s 36 will fortify the argument that the award is final and binding on the parties. Section 36 provision is not found in the model law. Section 36 places a higher threshold on the court when it intends to set aside an award related to a s 37 application. In this respect, the decision from other jurisdiction which does not have a similar provision will not be helpful, save those cases which had dealt with the jurisprudence relating to 'patent injustice' or unconscionability, etc s 36 of the Act reads as follows:

36 An award is final and binding

(1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.

(2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

[44] I am inclined to agree with Ms Shanti Mogan's argument that SASB and WCT's challenge under s 37(1)(a)(iv) and (v) of the AA 2005 is in effect a challenge on the merits of the claim which is not open to this court to delve into. It is not this court's task to consider whether the arbitrator was right or wrong in ordering payment to be made to ACES. Errors of law or lack of appreciation of facts are not considerations for setting aside an arbitral award or grounds to refuse recognition of an award.

[45] In addition, s 8 of the AA 2005 obviously circumscribed intervention by the court in matters related to arbitration by its very wordings:

No court shall intervene in matters governed by this Act, except where so provided in this Act.

[46] The policy of minimal curial intervention was reiterated by the Federal Court in *Jan De Nul*. Eight years before *Jan De Nul*'s case, minimal curial intervention was also emphasised by the same court in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441; [2011] 6 AMR 573; [2012] 3 CLJ 423 where Richard Malanjum CJ (Sabah and Sarawak) as his Lordship then was, delivering judgment of the court tersely said:

[53] And as Scrutton LJ put it '... *if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment*' (see *African & Eastern (Malaya), Ltd v White, Palmer & Co, Ltd* (1930) 36 LI L REP 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng* [1996] 1 MLJ 178; [1996] 2 CLJ 249). (Emphasis added.)

[47] In my judgment, SASB and WCT is not entitled to relitigate the matter.

Whether the corrective award was made outside the permitted scope of article 38 of Part II of the Arbitration Rules and s 35(1) of the AA 2005, and ought to be set aside

[48] Article 38(1) of the UNCITRAL Arbitration Rules as contained in Part II of the AIAC Arbitration Rules 2018 and s 35(1) and (2) of the AA 2005 expressly permit amendments/corrections to award with notice to the other parties within 30 days after the receipt of the award.

[49] In this case, the amendment was to replace 'Claimant' (MAHB) with 'ACES', in para 308.1 of the final award which reads 'I declare that the proportionate Fixed Monthly Charge is payable by the 1st Respondent to the Claimant in the sum of RM958,849.33 on a monthly basis from 02.05.2014 until and inclusive of September 2020'.

[50] SASB and WCT however argued that by replacing 'Claimant' with 'ACES', the corrective award was made ultra vires and invalid as by then, the arbitrator was already functus officio and has no jurisdiction, power and/or authority to issue the corrective award; the correction went beyond the scope permitted under article 38 of Part II of the AIAC Arbitration Rules and s 35(1) of the AA 2005.

[51] Ms Shanti Mogan on the other hand explained that the arbitrator in para 8 of the Correction to final award stated it is a typographical error or clerical error on his part. Ms. Shanti pointed out that the amendment is also consistent with paras 233, 237 and 244 and the orders in paras 308.2 and 308.3 of the final award.

[52] In this case, there was no dispute that the correction was made within 30 days. I am of the view that the correction is within the meaning of article 38 of Part II of the AIAC Arbitration Rules and s 35(1) AA 2005. This ground of challenge fails.

Whether the award is in conflict with the public policy of Malaysia by reason of breach of natural justice

[53] Mr Choon submitted that by departing from the pleaded case and making an order for a relief which was not prayed for, the learned arbitrator was, with respect, making a new case for MAHB and acted in breach of natural justice. Counsel elaborated that one of the most fundamental principles of our adversarial system is the principle that parties are bound by their pleadings, and in an arbitration, the tribunal's jurisdiction or the scope of reference is defined by pleadings — *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126. It was submitted, that if the arbitrator had adhered to the pleadings, then the arbitrator's own findings would have resulted in the dismissal of the claim. However, by allowing the unpleaded claim for specific performance as a result of the breach of natural justice, the arbitrator had

reversed the outcome of the arbitration. SASB had been substantively and irreversibly prejudiced.

[54] Counsel postulated on SASB and WCT's behalf that the breach of natural justice in the making of the award had a determinative effect on the outcome of the arbitration, which warrants the intervention by this honourable court to set it aside.

[55] In objecting to this head of challenge, Ms Shanti Mogan argued that the two issues advanced by SASB and WCT ie unpleaded case and order to make payment to third parties, do not concern matters pertaining to breach of public policy.

[56] For setting aside an arbitral award based on a breach of public policy, I would refer to an excerpt from the Federal Court decision in *Jan De Nul* as follows:

> [58] The scope of *public policy ground* for setting an arbitral award could only be invoked in deserving case ie, in instances where it appears *a violation of the most basic notions of morality and justice*. It covers fundamental principles of law and justice in substantive as well as procedural respect. Instances where the upholding of an arbitral award would *shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public*, had been held by courts in various jurisdiction to fall within the category of public policy ground for setting aside an arbitral award. *Thus, instances such as 'patent injustice', 'manifestly unlawful and unconscionable', substantial injustice', 'serious irregularity' and other similar serious flaws in the arbitral process and award, would also fall within the applicable concept of public policy and therefore by virtue of s 37 (1)(b)(ii) of the AA 2005 when proven, can be a ground for the court to exercise its discretion to set aside the award* (see: Ajwa for Food Industries). Such instances fall within 'the basic and fundamental notions or principles of justice'. The court must adopt the principle as laid down by Howard M Holtzmann and Joseph E Neuhans as found in their commentary in A guide to the UNCITRAL Model on International Commercial Arbitration: Legislative History and Commentary 'that the term 'public policy' which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects'. The terms 'patent injustice' or 'substantial injustice' or 'manifestly unlawful and unconscionable' as often used by the court in setting aside arbitral awards, do not mean injustice which is more than de minimis; what is required is that *the injustice had real effect and had prejudiced the basic right of the applicant* (see: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86). (Emphasis added.)

[57] A year later, in the case of *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213, after reviewing local and international cases and academic authorities on this matter, the Federal Court

speaking through Vernon Ong FCJ enunciated:

> [53] In light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:
>
> First the Court must consider (a) which rules of natural justice was breached; (b) how it was breached; and (c) in what the breach was connected to the making of the award;
>
> Second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;
>
> Third, if the breach is relatively immaterial or was not likely to have affected the outcomes, discretion will be refused;
>
> Fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;
>
> Fifth, where the breach is significant and might have affected the outcome, the award may be set aside;
>
> Sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic regardless of the effect on the outcome of the award;
>
> Seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact.
>
> Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the Court; and
>
> Eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice.

[58] I note that later in the same judgment, the Federal Court went on to state that the court's discretion to set aside an award under s 37(1) must be exercised with regard to the policies and objectives underpinning the AA 2005 and even if there is a breach of natural justice, setting aside is not automatic:

> [59] Although the *court's discretion* to set aside an award under s 37(1) is unfettered, it must nevertheless *be exercised with regard to the policies and objectives underpinning the AA 2005*. In particular, due cognizance must be taken of the purposes of encouraging arbitration as a method of dispute resolution and facilitating the recognition and enforcement of arbitral awards.
>
> ...
>
> [63] Because s 37 vests the court with a wide discretion on whether to set aside an award, we agree with the learned JC that *the decision to set aside an award is not an automatic outcome of a finding that there has been a breach of the rules of natural justice.*

> The court will still have to evaluate whether discretion should be exercised in the applicant's favour. In considering whether discretion should be exercised, there should be an evaluation of relevant factors such as those identified in *Kyburn Investments Ltd v Beca Corporate Holdings Ltd*, amongst which would be to consider the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration; leaving room for 'casual breach or occasional error'. Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in that evaluation. (Emphasis added.)

[59] Evaluating the facts and considering the matter as a whole, I am respectfully of the view that applying the criterias in *Jan De Nul*, I cannot find breach of public policy or natural justice during the arbitral proceedings or in connection with the making of the award such that the award offends 'the most basic notions of morality and justice'; or 'shock the conscience' is 'injurious to the public good'; or is 'wholly offensive to the ordinary reasonable and fully informed member of the public'; or that there was 'patent injustice' in the arbitral proceedings and award; or that the award is 'manifestly unlawful and unconscionable'; or that there was 'substantial injustice', 'serious irregularity' and other 'similar serious flaws'.

[60] I am of the view that in the present case, this ground of challenge would not succeed. There is nothing illegal in the award that contravened public policy, nor did SASB and WCT produce any evidence demonstrating that SASB and WCT were denied the opportunity to be heard in any way by the arbitrator, or anything wrong with the award.

[61] I accept MAHB's argument that this ground of attack is covered under the 1st challenge, and that SASB and WCT are actually disputing the merits of the award and not attacking the decision-making process. I am therefore not satisfied that SASB and WCT have been denied natural justice by the arbitrator, and find that SASB and WCT's contentions are in substance, an appeal but cloaked as a denial of natural justice.

[62] In my utmost respectful view, attacking the merits of the award is only permissible under s 42 of the AA 2005 which was repealed in 2018 (following the Federal Court judgment in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1. The amendment brought Malaysia in tandem with other jurisdictions which do not permit referrals to court on a question of law arising from an award) and not under s 37 of the AA 2005.

[63] The difference between ss 37 and 42 of the Act was explained by the Federal Court in *Jan De Nul* as follows:

[64] ... Both these sections relate to different purposes and different tests for consideration. They are not the same. The consideration by the court in dealing with the applications under the sections varies. The cited test applicable in establishing an application under the s 42 may not be the same with and not applicable to an application under s 37 of the Act.

[65] In drawing a clear distinction between ss 37 and 42 of the AA 2005, the Court of Appeal in Petronas Penapisan, made the following observation (with which we agree):

> *An application to set aside an award under s 37 largely deals with issues relating to the award making process and has nothing to do with error of facts and/or law on the face of record unless the exception applies; such as public policy.* An application under s 42 has nothing to do with the award making process but has everything to do with the award per se and error of law on the face of record which error substantially affects the rights of one or more of the parties. The distinction between ss 37 and 42 is that like of an apple and an orange.'

[64] Across the causeway, in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86, the Singapore Court of Appeal in dealing with the argument of a breach of natural justice raised in an attempt to set aside an arbitral award explained at p 119 as follows:

> It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrators, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without appraising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled — indeed, it is his obligation, to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by parties, neither is he expected to consult the parties on his thinking process before finalizing the award unless it involves a dramatic departure from what has been presented to him.
>
> *Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.* (Emphasis added.)

[65] In the final analysis, reading the award generously in consonance with *Soh Beng Tee*, I am of the utmost respectful view that the matters dealt with in the award are matters well within the domain of the arbitrator and that they are not grounds to be raised in an application to set aside the award. Even if, assuming SASB and WCT's complaint is made out on breach of public policy or natural justice during the arbitral proceedings or in connection with the making of the award, this court nevertheless, has a discretion not to set aside an

award under s 37(1) AA 2005. This is clear from the use of the permissive word 'may' in s 37(1) of the AA 2005.

[66] For all these reasons, I dismissed OS 25 with costs.

RECOGNITION AND ENFORCEMENT APPLICATION (OS 26)

[67] MAHB is seeking to register and enforce the award against SASB.

[68] MAHB has complied with the provisions of s 38 of the AA 2005 which stipulates:

> 38 Recognition and enforcement
>
> (1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State *shall*, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.
>
> (2) In an application under subsection (1) the applicant shall produce —
>
> (a) the duly authenticated original award or a duly certified copy of the award; and
>
> (b) the original arbitration agreement or a duly certified copy of the agreement.
>
> (3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.
>
> (4) For the purposes of this Act, 'foreign State' means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

[69] The wording of s 38(1) of the AA 2005 is cast in mandatory language by the use of the word 'shall'.

[70] Apart from compliance with s 38 of the AA 2005, based on the agreement of the parties as set out in para 2 above, it follows that OS 26 must be allowed with costs.

[71] OS 25 is dismissed with costs. OS 26 is allowed with costs.

[72] I must not conclude without recording my appreciation to the parties'

counsel for their comprehensive and able submissions on several of the points covered in this judgment. My not addressing here each and every single argument and case authority submitted by the parties is not meant as a discourtesy as I find it strictly unnecessary to do so in arriving at a decision, and to avoid a lengthy judgment. I state this formally for the avoidance of doubt.

OS 25 dismissed with costs; OS 26 allowed with costs.

Reported by Dzulqarnain bin Ab Fatar